

A Stadco Sdn Bhd v Woolley Development Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-02(IM)-877 OF 2011

B MOHD HISHAMUDIN, AZHAR MA'AH AND AZAHAR MOHAMED
 JJCA
 31 JULY 2013

C *Civil Procedure — Pleadings — Statement of claim — Amendment of — Adding
new cause of action — Inordinate delay in application — Whether delay
satisfactorily explained — Whether appellant allowed to rely on existence of 'default
judgment' to justify inordinate delay — Whether respondent would be prejudicial if
proposed amendment were to be allowed at very late stage of proceeding*

D This was an appeal against the decision of the High Court dismissing the
appellant's application to amend its statement of claim to add a new cause of
action. The appellant, the plaintiff at the High Court, filed a writ action and
statement of claim in 2002. The writ and statement of claim cited 'Cherating
E Development Sdn Bhd' ('Cherating Development') as the first defendant.
Cherating Development was not a party to this appeal. The respondent was
cited as the second defendant in the writ action. Cherating Development was
the owner of several parcels of land in Butterworth. Around 1996/1997 the
first defendant developed the parcels of land, constructing several shop offices
F in a project called 'Raja Uda Commercial Centre'. The appellant alleged that it
had entered into 212 sale and purchase agreements with the first defendant to
purchase the shop offices. It was also alleged in the statement of claim, that it
was a term in the sale and purchase agreements that the agreements shall be
binding upon the successors in title and/or permitted assigns of the first
G defendant. It was further alleged in the statement of claim that the appellant
agreed to pay the first defendant the full purchase price of the shop offices
without waiting for their construction, in consideration of the first defendant
giving the appellant a discount in the form of 16 free shop offices. The original
claim of the appellant against the respondent was, firstly, for the tort of
H conspiracy to defraud, in that the respondent conspired with the first
defendant to defraud the appellant; and, secondly, for breach of trust. The
appellant then entered a 'default judgment' against the respondent which was
eventually set aside by the High Court. Subsequent to that, the application to
amend the statement of claim via summons in chambers was filed in November
I 2010. The learned High Court judge allowed certain proposals to amend; but
refused to allow the remaining proposals in particular, the addition of
paras 12C and 12D. In the proposed para 12C, it was alleged that the
respondent was the successor in title to, and/or the permitted assign of, the first
defendant under the sale and purchase agreements. As for proposed para 12D,

it was alleged that the respondent was in breach of the sale and purchase agreements. This appeal was against the said decision of the learned High Court judge.

Held, dismissing the appeal with costs:

- (1) There was inordinate delay in the application to amend the statement of claim, which delay had not been satisfactorily explained. Noting that the writ was filed in February 2002 and the application to amend was filed only in November 2010, there had been a very long delay of about eight years. The appellant could not rely on the existence of the 'default judgment' to justify the inordinate delay. It was the appellant itself who had entered the 'default judgment' (see paras 20 & 22).
- (2) The fact that the High Court did eventually set aside the 'default judgment' only went to show that, in the first place, the 'default judgment' was unlawfully entered by the appellant. The appellant now cannot rely on its own unlawful act to justify the long delay; for it was elementary that a litigant could not benefit from his own wrongdoing (see para 23).
- (3) It would be prejudicial to the respondent if the proposal to amend were to be allowed at this very late stage of the proceeding. Case law authorities on delay in making an application to amend pleadings were clear, especially where the delay was substantial and the excuse given was weak. A litigant cannot be allowed to amend his pleading at anytime he likes at his whims and fancy (see para 24).

[Bahasa Malaysia summary]

Ini merupakan rayuan terhadap keputusan Mahkamah Tinggi menolak permohonan perayu untuk meminda pernyataan tuntutan untuk menambahkan kausa tindakan yang baru. Perayu, plaintif di Mahkamah Tinggi, memfailkan writ tindakan dan pernyataan tuntutan pada 2002. Writ dan pernyataan tuntutan menamakan 'Cherating Development Sdn Bhd' ('Cherating Development') sebagai defendan pertama. Cherating Development bukanlah pihak kepada rayuan ini. Responden telah dinamakan sebagai defendan kedua di dalam writ tindakan. Cherating Development merupakan pemilik beberapa bidang tanah di Butterworth. Sekitar 1996/1997 defendan pertama membangunkan petak-petak tanah, membina beberapa kedai pejabat dalam projek dinamakan 'Raja Uda Commercial Centre'. Perayu mendakwa bahawa ia telah memeterai 212 perjanjian jual beli dengan defendan pertama untuk membeli kedai-kedai pejabat tersebut. Adalah juga didakwa di dalam pernyataan tuntutan bahawa ia merupakan terma di dalam perjanjian jual beli bahawa perjanjian-perjanjian adalah terikat ke atas pewaris hak milik dan/atau pemegang serah dibenarkan defendan pertama. Selanjutnya adalah didakwa di dalam pernyataan tuntutan bahawa perayu

- A bersetuju untuk membayar defendan harga belian penuh kedai-kedai pejabat tanpa menunggu pembinaan mereka, dalam pertimbangan defendan pertama telah memberikan perayu diskaun dalam bentuk 16 kedai-kedai pejabat percuma. Tuntutan asal perayu terhadap responden adalah pertamanya, untuk tort subahat untuk menipu, iaitu responden bersubahat dengan defendan
- B pertama untuk menipu perayu; dan keduanya, pecah amanah. Perayu kemudiannya memasukkan 'default judgment' terhadap responden yang mana kemudiannya diketepikan oleh Mahkamah Tinggi. Berikutan itu, permohonan untuk meminda pernyataan tuntutan melalui saman dalam kamar telah difailkan pada November 2010. Hakim Mahkamah Tinggi yang
- C bijaksana membenarkan beberapa cadangan untuk meminda, tetapi enggan untuk membenarkan cadangan yang selebihnya terutama, penambahan perenggan-perenggan 12C dan 12D. Dalam perenggan 12C yang dicadangkan, adalah didakwa bahawa responden adalah pewaris hak milik kepada, dan/atau pemegang serah dibenarkan defendan pertama di bawah perjanjian-perjanjian jual beli. Mengenai perenggan 12D yang dicadangkan, adalah didakwa bahawa responden telah melanggar perjanjian-perjanjian jual beli. Rayuan ini adalah terhadap keputusan hakim Mahkamah Tinggi yang bijaksana.
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- E **Diputuskan**, menolak rayuan dengan kos:
- (1) Terdapat kelewatan yang terlampau di dalam permohonan untuk meminda pernyataan tuntutan, yang mana kelewatan tersebut tidak
- F dijelaskan dengan secukupnya. Melihatkan writ telah difailkan pada Februari 2002 dan permohonan untuk meminda difailkan hanya pada November 2010, terdapat kelewatan yang amat lama sekitar lapan tahun. Ia adalah perayu sendiri yang telah memasukkan 'default judgment' (lihat perenggan 20 & 22).
- G (2) Fakta bahawa Mahkamah Tinggi kemudiannya mengetepikan 'default judgment; hanya menunjukkan bahawa, alasannya, 'default judgment' telah salah di sisi undang-undang dimasukkan oleh perayu. Perayu kini tidak boleh bergantung kepada tindakannya yang salah di sisi
- H undang-undang untuk menjustifikasikan kelewatan yang amat lama; kerana ia adalah asas bahawa litigan untuk tidak mendapat faedah daripada salah lakunya sendiri (lihat perenggan 23).
- (3) Ia adalah prejudis kepada responden sekiranya cadangan untuk meminda dibenarkan pada peringkat yang sangat lewat prosiding tersebut. Autoriti-autoriti kes undang-undang mengenai kelewatan dalam membuat permohonan untuk meminda pliding-pliding adalah jelas, terutamanya apabila kelewatan adalah penting dan alasan yang diberikan adalah lemah. Litigan tidak boleh dibenarkan untuk meminda plidingnya pada bila-bila masa sesuka hatinya (lihat perenggan 24).]
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Notes

For cases on statement of claim, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 6580–6622.

Cases referred to

Bacom Enterprise Sdn Bhd v Jong Chuk & Ors [1998] 2 MLJ 301; [1998] 2 CLJ 11, CA (refd)

Dato' V Kanagalingam v David Samuels & Ors [2006] 6 MLJ 521; [2006] 3 CLJ 909, HC (refd)

Kaplands Sdn Bhd v Lee Chin Cheng Dengkil Oil Palm Plantations Sdn Bhd [2001] 1 MLJ 297; [2000] 4 CLJ 281, HC (refd)

Kettleman and others v Hansel Properties Ltd [1988] 1 All ER 38, HL (refd)

Appeal from: Civil Suit No S6–22–206 of 2002 (High Court, Kuala Lumpur)

Muhammad Shafee bin Md Abdullah (Azad Bashir and KL Pang with him) (Shafee & Co) for the appellant.

Gan Techiong (Gan & Lim) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the High Court of Kuala Lumpur of 28 February 2011 dismissing the appellant's application to amend its statement of claim to add a new cause of action.

[2] The appellant is the plaintiff at the High Court. The appellant's writ action and statement of claim was filed on 28 February 2002. In the writ and statement of claim, the appellant cites a company called 'Cherating Development Sdn Bhd' ('Cherating Development') as the first defendant. Cherating Development is not a party to this appeal. The respondent, Woolley Development Sdn Bhd is cited as the second defendant in the writ action. The first defendant, Cherating Development, is the owner of several parcels of land in Butterworth. Around 1996/1997 the first defendant developed the parcels of land, constructing several shop offices in a project called 'Raja Uda Commercial Centre'. The appellant alleges that it had entered into 212 sale and purchase agreements with the first defendant on 6 January 1997 to purchase the shop offices. It is also alleged in the statement of claim that it is a term in the sale and purchase agreements that the agreements shall be binding upon the successors in title and/or permitted assigns of the first defendant. It is further averred in the statement of claim that the appellant agrees to pay the first defendant the full purchase price of the shop offices without waiting for their construction, in consideration of the first defendant giving the appellant a discount in the form of 16 free shop offices.

[3] The original claim of the appellant against the respondent was, firstly, for

A the tort of conspiracy to defraud, in that the respondent conspired with the first defendant to defraud the appellant; and, secondly, for breach of trust.

[4] The respondent's statement of defence was filed on 2 April 2002. The respondent denies the appellant's allegations.

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[5] On 11 August 2004, after a series of case management dates, the appellant entered a 'default judgment' against the respondent. It is not clear from the order drawn up (and also from the appeal record) as to pursuant to which provision of law was the 'default judgment' applied for and obtained. Be that as it may, the 'default judgment' order of 11 August 2004 was eventually set aside by the High Court on 3 June 2010 (see the appellant's own affidavit at para 7.1 of the affidavit of Tan Aik Teck, a director of the appellant company, affirmed on 8 December 2010 which can be found at p 292 *jilid* 2(1) of the appeal record).

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[6] The application to amend the statement of claim via summons in chambers was filed subsequently on 2 November 2010.

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[7] On 28 February 2011, upon hearing the application to amend, the learned High Court judge allowed certain proposals to amend; but refused to allow the remaining proposals. The present appeal before us only concerns the certain proposals to amend that were not allowed by the learned High Court judge, in particular, the proposals:

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- (a) to add paras 12C and 12D; and
- (b) to add new prayers in para 19, namely, prayers (3)(a), (3)(d)(i) and (3)(d)(ii).

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[8] In this judgment, we shall focus mainly on the proposal to add the two new paragraphs to the statement of claim, namely, paras 12C and 12D, rather than on the proposal to amend para 19 of the same (to add the new prayers (3)(a), (3)(d)(i) and (3)(d)(ii)). This is because the proposal to amend the prayers at para 19 is only consequential to the proposal to add paras 12C and 12D. If the application to add paras 12C and 12D should be allowed, then, the application to amend the prayers at para 19 should also be allowed; and vice versa.

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[9] The proposed new paras 12C and 12D read as follows:

12C. The Second Defendant is and/or has become the successor in title and/or permitted assign of the First Defendant, by reason of which the 192 Agreements are binding upon the Second Defendant and are enforceable by the Plaintiff against the Second Defendant for any breach of contract of the terms and conditions therein.

12D Therefore, Second Defendant is also in breach of the terms and conditions of the 192 Agreements for its failure, refusal and/or neglect to perform the contractual obligations as set out in paragraphs 11.1 to 11.4 above.

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[10] It is significant to note that the appellant's affidavit in support of the application to amend (that of Tan Aik Teck, a director of the appellant company, affirmed on 1 November 2010) is very brief and does not explain the reason as to why there is the need to add the new paras 12C and 12D.

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[11] In the proposed para 12C it is now alleged that the respondent is the successor in title to, and/or the permitted assign of, the first defendant under the sale and purchase agreements.

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[12] In the proposed para 12D it is now alleged that the respondent is in breach of the sale and purchase agreements.

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[13] The proposed amendments to para 19, to put it briefly, are for the remedies of declaration and specific performance in respect of the alleged respondent's breach of the sale and purchase agreements.

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[14] In its affidavit in opposition (that of Rosli bin Zainal Abidin, a director of the respondent company affirmed on 8 December 2010), the respondent's response to the appellant's proposal to insert paras 12C and 12D is as follows:

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7. Saya membantah perenggan 12C yang dicadangkan kerana Defendan Pertama tidak melaksanakan apa-apa pindah milik tanah atau penyerahan hak (no assignment) kepada Defendan Kedua dan oleh demikian Defendan Kedua tidak mungkin menjadi pengganti hakmilik (successor-in-title) Defendan Pertama.

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8. Pindaan kepada perenggan 12D yang dicadangkan adalah suatu percubaan oleh Plaintiff untuk menimbulkan kuasa tindakan baru dan tidak boleh dibenarkan. Dalam apa jua keadaan, tiada isu kemungkiran kontrak oleh Defendan Kedua mungkin timbul terhadap Plaintiff. Defendan Pertama telahpun mungkir kontraknya dengan Plaintiff pada 6-1-2000 manakala Defendan Kedua mula berurusan dengan Defendan Pertama hanya pada bulan September 2000. Defendan Kedua tiada kaitan dengan Plaintiff.

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[15] To the above averments of the respondent, the appellant, in its affidavit in reply (that of Tan Aik Teck affirmed on 8 December 2010), responded as follows:

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12. In reply to paragraph 7 of Rosli's Affidavit, I am advised by the Plaintiff's solicitors and I verily belief that the proposed insertion of paragraph 12C is consistent with the Court of Appeal's finding against the 2nd Defendant in the same

A Project in the reported case of *Woolley Development Sdn Bhd v Mikien Sdn Bhd* [2008] 1 MLJ 585. There is now shown to me a copy of the reported case annexed herewith and marked as exhibit ‘TAT-7’.

13. In respect of paragraph 8 of Rosli’s Affidavit, I refer to paragraphs 8 and 12 above in reply thereto.

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[16] Paragraph 8 of the appellant’s affidavit in reply (that of Tan Aik Teck dated 8 December 2010) states:

C 8. In reply to paragraph 4(b) of Rosli’s Affidavit, I am advised by the Plaintiff’s solicitors and I verily believe that the proposed amendments arose out of the same facts or substantially the same facts as the Plaintiff’s original pleading.

D [17] Paragraph 4(b) of Rosli’s affidavit in opposition (affirmed on 8 December 2010) states:

4. Defendan Kedua membantah pindaan dibuat oleh Plaintiff kepada Pernyataan Tuntutan Terpinda atas alasan-alasan utama yang berikut

(a) ...

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(b) pindaan yang dicadangkan oleh Plaintiff menimbulkan kuasa tindakan yang baru, dan yang memudaratkan Defendan Kedua kerana Defendan Kedua sudah mempunyai pembelaan kukuh - yang boleh menyangkal Pernyataan Tuntutan Terpinda (yang sedia ada) dengan sepenuhnya.

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[18] On 16 November 2011, after hearing submissions of parties, we, unanimously, dismissed the appeal.

[19] We shall now explain our decision.

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[20] With respect, we accept the submission of learned counsel for the respondent that there is inordinate delay in the application to amend the statement of claim, which delay has not been satisfactorily explained. Noting that the writ was filed on 28 February 2002 and the application to amend was filed only on 2 November 2010, there has been a very long delay of about eight years.

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[21] In answer to the respondent’s contention that there had been inordinate delay, the appellant’s response can be found in para 7 of the affidavit in reply of Tan Aik Teck affirmed on 8 December 2010. This paragraph states:

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7. I deny the allegations of inordinate delay in paragraphs 4(a) and 9 of Rosli’s Affidavit. I am informed by the Plaintiff’s solicitors and I verily believe that -

(a) The Judgment as against the 2nd Defendant was only set aside this year on

3-6-2010 - pursuant to an application by the 2nd Defendant on 16-11-2009, a copy of which is annexed herewith and marked as exhibit 'TAT-5'; and

(b) no trial dates have been fixed.

[22] With respect, we do not think that this is a satisfactory explanation for the long delay. The appellant cannot rely on the existence of the 'default judgment' to justify the inordinate delay. It was the appellant itself who had entered the 'default judgment'. As we have pointed out earlier, we are in no position to understand as to under what circumstances the 'default judgment' was entered by the appellant, as the appeal record does not contain the affidavits of the application to set aside the 'default judgment'. The appellant's appeal record, unfortunately, only exhibits the respondent's summons in chambers dated 16 November 2009 applying to set aside the 'default judgment' (see p 317 of *jilid 2*(1) of the appeal record) but omitted to exhibit the rest of the cause papers including the setting aside order. But, as we see it, the fair inference that must be made here is that, the fact that the High Court did eventually set aside the 'default judgment', only goes to show that, in the first place, the 'default judgment' was unlawfully entered by the appellant. The appellant now cannot rely on its own unlawful act to justify the long delay; for it is elementary that a litigant cannot benefit from his own wrongdoing (*Dato' V Kanagalingam v David Samuels & Ors* [2006] 6 MLJ 521; [2006] 3 CLJ 909).

[23] In any event, even if we were to put aside the 'default judgment' period for the sake of argument, the appellant could have applied for the amendment a long time ago before entering the 'default judgment' on 11 August 2004, which is more than two years after the filing of the writ action. Again, after the default judgment had been set aside by the High Court on 3 June 2010, it still could have filed the application to amend soon after the setting aside order. Yet it chose not to, but to make the application (to amend) only some five months later on 2 November 2010.

[24] Clearly, it would be prejudicial to the respondent if the proposal to amend were to be allowed at this very late stage of the proceeding. The case law authorities on delay in making an application to amend pleadings are clear, especially where the delay is substantial and the excuse given is weak (see *Kaplands Sdn Bhd v Lee Chin Cheng Dengkil Oil Palm Plantations Sdn Bhd* [2001] 1 MLJ 297; [2000] 4 CLJ 281; *Bacom Enterprise Sdn Bhd v Jong Chuk & ors* [1998] 2 MLJ 301; [1998] 2 CLJ 11; and *Kettleman and others v Hansel Properties Ltd* [1988] 1 All ER 38). A litigant cannot be allowed to amend his pleading at anytime he likes at his whims and fancy.

A [25] Appeal dismissed with costs.

Appeal dismissed with costs.

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Reported by Ashgar Ali Ali Mohamed

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